IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of GARTH D. SNIVELY, Petitioner.	)	NO. 59975-5-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: March 1, 2010

Lau, J. — In this personal restraint petition (PRP), Garth Snively collaterally attacks the validity of his 1993 indecent liberties and first degree child molestation convictions that served as the predicate offenses in his current sexually violent predator (SVP) commitment under chapter 71.09 RCW. Specifically, Snively argues that (1) his PRP is timely under RCW 10.73.090(1) because the judgment and sentences are facially invalid, (2) because he was misinformed about the community placement terms, his guilty pleas were involuntary and he is entitled to withdraw them, (3) his PRP is timely because it was filed one year from the date of the SVP commitment order, (4) his SVP commitment is invalid since his 1993 convictions were based on involuntary guilty pleas, and (5) his counsel's ineffective assistance during

plea negotiations renders the pleas involuntary. Because community placement was not a statutorily authorized consequence of indecent liberties and because he was misinformed about that direct consequence of his plea, we conclude the indecent liberties judgment and sentence is facially invalid and entitles him to withdraw this guilty plea. But because Snively's child molestation guilty pleas were not part of a "package deal," the judgment and sentence correctly imposed two years of community placement, and the PRP challenging the child molestation is untimely, Snively is not entitled to withdraw these pleas. Accordingly, Snively may withdraw his indecent liberties guilty plea, but the petition challenging his SVP commitment order is denied.

FACTS AND PROCEDURAL HISTORY

In 1993, Garth Snively pleaded guilty to one count of indecent liberties and two counts of first degree child molestation. He was sentenced on these convictions on January 25, 1994. The indecent liberties conviction was based on events that occurred "on or about the 2nd day of July 1984 through 1987." Response to Pers. Restraint Petition, Ex. 9. Snively's statement of defendant on plea of guilty (plea statement) advised, "[T]he judge will sentence me to community placement for at least 1 year." Declaration of Snively, Appendix 3 at 3. And the State's related sentencing recommendation advised, "[T]he defendant shall serve a one-year term of community placement . . . ." Declaration of Snively, Appendix 3 at 8. Although community placement was not statutorily authorized for indecent liberties, the court imposed a two-year term of community placement.

For the child molestation convictions, the plea statement advised that Snively

would be sentenced to "at least 1 year" of community placement. And the State's sentence recommendation also advised Snively that he would serve "a one-year term" of community placement. Declaration of Snively, Appendix 7. But the court imposed a statutorily authorized two-year term of community placement.

In 2000, Snively filed a PRP challenging those three convictions, which this court dismissed as untimely. On April 13, 2003, the State filed a sexually violent predator petition under chapter 71.09 RCW, seeking to involuntary commit Snively. The petition alleged,

> 1. Respondent has been convicted of the following sexually violent offense(s) . . .
> a) On or about October 25, 1993, in Snohomish County, Washington, the Respondent was convicted of Child Molestation in the 1st Degree, 2 counts;
> b) On or about December 21, 1993, in Snohomish County, Washington, the Respondent was convicted of Indecent Liberties against a Child Under the Age of 14.
> 2. Respondent currently suffers from:
> a) A mental abnormality, as that term is defined in RCW 71.09.020(8) . . .
> 3. Respondent's [mental abnormalities] cause him to have serious difficulty in controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility.

Declaration of Snively, Appendix 1. After a sexually violent predator finding by a jury, Snively was civilly committed to indefinite custody on July 17, 2006. He now collaterally attacks the validity of these underlying convictions and their use as predicate offenses in his current SVP commitment.

ANALYSIS

Facial Invalidity—Indecent Liberties

Snively first argues that because his judgment and sentence for indecent

liberties is facially invalid under RCW 10.73.090(1) and in excess of the court's jurisdiction under RCW 10.73.100(5), the one-year time bar does not apply to his PRP. The State concedes that the judgment and sentence is invalid on its face and in excess of the court's jurisdiction.[1]

Under RCW 10.73.090 (1), a petitioner must bring a PRP within one year "after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."[2] "'Invalid on its face' means the judgment and sentence evidences the invalidity without further elaboration." In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). In making that

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[1] The State concedes that this error "appear[s] on the face of the judgment and sentence, without further elaboration" and "was in excess of the court's jurisdiction." Response to Pers. Restraint Petition at 9, 11.

[2] In addition, RCW 10.73.100 creates several specific exceptions to the one-year time bar. "The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

"(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

"(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

"(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

"(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

"(5) The sentence imposed was in excess of the court's jurisdiction; or

"(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard."

determination, courts may consider documents signed as part of a plea agreement if they are relevant to assessing the validity of a judgment and sentence. Hemenway, 147 Wn.2d at 532; In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000).

Here, the plea statement advised Snively that "the judge will sentence [him] to community placement for at least 1 year" and the State's sentence recommendation advised him, "The defendant shall serve a one-year term of community placement." Declaration of Snively, Appendix 3 at 3, 8. But the judgment and sentence imposed two years of community placement based on events that took place "on or about the 2nd day of July, 1984 through 1987." Response to Pers. Restraint Petition, Ex. 9. As the State acknowledges, a one-year community placement term only became available in 1988 and then only for crimes committed on or after July 1, 1988. Former RCW 9.94A.120(8)(a), as amended by Laws of 1988, ch. 153 § 2. A two-year community placement term was available only for crimes committed on or after July 1, 1990. Former RCW 9.94A.120(8)(b), as amended by Laws of 1990, ch. 3, § 705. Thus, the judgment and sentence imposed a sentence that on its face was not statutorily authorized at the time of the offense. Accordingly, Snively's challenge to the indecent liberties conviction is timely under RCW 10.73.090(1).

Voluntariness of the Plea—Indecent Liberties

We next turn to the proper remedy. Snively argues that he is entitled to withdraw his indecent liberties guilty plea as involuntary because he was misinformed about a direct consequence of the plea—community placement. The State maintains that the PRP should either be dismissed as a "mixed petition" under Stoudmire or that

the proper remedy is to remand to the trial court for resentencing.

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). Beyond that, CrR 4.2(f) provides, "The court shall allow a defendant to withdraw [his guilty plea] whenever it appears that the withdrawal is necessary to correct a manifest injustice." An involuntary plea constitutes a manifest injustice for purposes of CrR 4.2(f). State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

A guilty plea is considered involuntary, and withdrawal of the plea is available if it was based on misinformation regarding direct consequences of the plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). Mandatory community custody is a direct consequence of a plea. Isadore, 151 Wn.2d at 298. We will not inquire into the materiality of the misinformation in a defendant's subjective decision to plead guilty. Isadore, 151 Wn.2d at 302. And a plea is considered involuntary even where an offender score miscalculation results in a lower standard range than anticipated during plea negotiations. Mendoza, 157 Wn.2d at 584.

In Isadore, the Supreme Court concluded that a plea was involuntary and could be withdrawn where it did not inform the petitioner that community placement was a direct consequence of the plea. Isadore, 151 Wn.2d at 302. Isadore pleaded guilty to second degree burglary and third degree assault, but he was not informed about mandatory community placement. His sentence was later amended to add a one-year term of community placement. Isadore, 151 Wn.2d at 297. Reviewing his subsequent

PRP, the court held, "[A] defendant must be informed of all direct consequences of a guilty plea, and that failure to inform the defendant of a direct consequence renders the plea invalid." Isadore, 151 Wn.2d at 301. Furthermore, the court declined "to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty." Isadore, 151 Wn.2d at 302.

Like Isadore, Snively was misinformed about the term of community placement. While Isadore was informed that he faced no community placement but later had a two-year term imposed, Snively was informed that he faced a one-year term, but the court imposed a two-year term. This misinformation regarding a direct consequence of a plea renders Snively's plea involuntary. Under Isadore and Mendoza, Snively is entitled to withdraw his indecent liberties plea.[3]

Finally, the State maintains that Stoudmire and In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 72 P.3d 703 (2003) require we dismiss the petition. But here, the State has properly conceded facial invalidity under RCW 10.73.090(1). Under these circumstances, we do not find the Stoudmire and Hankerson decisions, which deal with mixed petitions under RCW 10.73.14.100, persuasive.

Facial Invalidity—Child Molestation

Snively next argues that his child molestation judgment and sentence is facially

[3] The State, citing Brooks v. Rhay, 92 Wn.2d 876, 602 P.2d 356 (1979), argues that the proper remedy is to remand for resentencing. But Brooks involved habeas relief, not a PRP under chapter 10.73 RCW, and there is no indication that the defendant there was convicted upon a plea of guilty. Where, as here, a defendant is misinformed about a direct consequence of a plea, the plea is considered involuntary and withdrawal is available. Mendoza, 157 Wn.2d at 584.

invalid because he "was never properly informed of his maximum sentence." Supplemental Br. of Petitioner at 4. Specifically, he contends that the judgment and sentence is facially invalid because it imposed a two-year term of community placement, but the plea statement and the State's sentencing recommendation advised him that he would receive "at least one year" and "a one year term" of community placement.[4] The State responds that because the law at the time required the court to impose a minimum of two years of community placement, the judgment and sentence is valid on its face.

"'Invalid on its face' means the judgment and sentence evidences the invalidity without further elaboration." Hemenway, 147 Wn.2d at 532. And while courts have interpreted "on its face" to include documents signed as part of a plea agreement, we can examine those documents only when they are relevant to assessing the validity of the judgment and sentence. Hemenway, 147 Wn.2d at 532; Stoudmire, 141 Wn.2d at 353.

Our Supreme Court addressed a similar issue in Hemenway. There, neither the plea agreement nor the court informed the defendant that he could be subject to community placement. Hemenway, 147 Wn.2d at 532. However, because the judgment and sentence correctly imposed community placement "'for the period of time provided by law'" the court held that it was not facially invalid and the one year time bar

[4] The plea statement states, "[T]he judge will sentence me to community placement for at least 1 year," and the State's sentencing recommendation states, "The defendant shall serve a one-year term of community placement . . . ." Declaration of Snively, Appendix 7.

applied. Hemenway, 147 Wn.2d at 531. The facts here are analogous. Like Hemenway, Snively was misadvised about the possibility of community placement but was correctly sentenced to a statutorily authorized term. Accordingly, his plea documents do not "bear on the facial validity of the judgment and sentence." Hemenway, 147 Wn.2d at 533 n.2. Because Snively fails to demonstrate a facial invalidity in his child molestation judgment and sentence, we conclude this claim is time barred under RCW 10.73.090(1).

Effect of Withdrawal on Child Molestation Plea

Snively submitted supplemental authority, citing In re Pers. Restraint of Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009). That case held that a defendant may withdraw guilty pleas for multiple convictions, where one was based on misinformation regarding a direct consequence of a plea and one was not, only if they are part of a "package deal." Bradley, 165 Wn.2d at 941. The Bradley court explained,

> A plea bargain is a "'package deal'" if the agreements as to the individual charges are indivisible from one another. This court looks to objective manifestations of intent in determining whether a plea agreement was meant to be indivisible. Where "pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding," the pleas are indivisible from one another.

Bradley, 165 Wn.2d 934 at 941–42 (citations omitted) (quoting State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003)). A plea agreement can be indivisible where the pleas are described in different documents that reference one another. Bradley, 165 Wn.2d at 942–43. Unlike Bradley, here the undisputed record shows that Snively's pleas were not negotiated as a "package deal." First, Snively pleaded guilty to

indecent liberties and first degree child molestation in separate proceedings. He pleaded guilty to the first degree child molestation charges on October 25, 1993, and later pleaded guilty to the indecent liberties charge on December 21, 1993. Importantly, the allegations leading to the indecent liberties charge became known only after the victims heard about his child molestation guilty pleas. And while the indecent liberties plea agreement references the child molestation cause number, the child molestation plea agreement does not mention indecent liberties. We conclude that under Bradley, Snively's pleas to indecent liberties and two counts of first degree child molestation were not a "package deal." Thus, withdrawal of the indecent liberties plea does not entitle Snively to also withdraw his child molestation pleas.

Time Bar Application to SVP Commitment

Snively argues, alternatively, that under In Re Pers. Restraint of Paschke, 80 Wn. App. 439, 909 P.2d 1328 (1996), his PRP is timely because he filed it within one year from his SVP commitment order. Specifically, he asserts the "use" of convictions in other proceedings "renews" the one-year limitation period for challenging these convictions. In contrast, the State maintains that Snively's PRP is untimely because the limitation period began to run when the judgment and sentences were entered on his prior convictions. It relies on In re Pers. Restraint of Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993), as controlling authority.

Runyan involved several consolidated cases challenging the constitutionality of RCW 10.73.090. Runyan, 121 Wn.2d at 436. One of the petitioners, Kelly, pleaded guilty to first degree robbery on February 1, 1991. In computing his offender score, the

sentencing court used Kelly's five previous convictions from the 1970s and 1980s (one robbery and four burglary convictions). He filed a PRP on July 19, 1991, challenging the use of the three earliest convictions, stating that he had not been advised of his right to remain silent and that his guilty pleas in those cases were invalid. Because Kelly filed his PRP within one year from his 1991 robbery conviction, he argued that he could collaterally attack the prior convictions. The court rejected that argument, noting, "To allow such a reading would undermine the very purpose of RCW 10.73.090, which is to encourage prisoners to bring their collateral attacks promptly." Runyan, 121 Wn.2d at 450. Accordingly, the court held, "Unless the petitioner can challenge these convictions under one of the exceptions [contained in RCW 10.73.100], his challenge is now barred. Runyan, 121 Wn.2d at 451.

But Snively contends, "In a case where a PRP was considered many years after the date of the original criminal convictions and the convictions were used as predicates to civil commitment under the SVP statute, the Court of Appeals in In Re Paschke, held that the PRP was nevertheless timely." Petitioner's Opening Br. at 15 and Reply Br.
at 5 (citation omitted). He claims this holding provides compelling authority to support a rule that use of a prior conviction in other proceedings renews the one-year limitation period. We disagree.

While referring to the issue as one of first impression in Washington, the Paschke court held that the possibility of future confinement as an SVP is a collateral consequence of pleading guilty to prior crimes that a trial court has no duty to advise

about at the time of the guilty plea. Paschke , 80 Wn. App. at 444. The case turned on the validity of the prior guilty pleas and whether the petitioner had been adequately advised of the consequences of pleading guilty. But Snively relies on a passing comment in footnote 2 as the opinion's central holding.

> The State argues Mr. Paschke's challenge to his prior convictions is untimely, citing RCW 10.73.090(1) . . . .
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> . . . .
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> It would appear Mr. Paschke's challenge is untimely only if it is viewed as a challenge to the restraint imposed in those prior convictions. Here, Mr. Paschke is seeking relief from restraint imposed as a result of the finding he is a sexually violent predator. While that finding was based, in part, on the prior convictions, the one year time limit commences as of the date of the sexual predator finding.

Paschke, 80 Wn. App. at 445 n.2. In addition to its placement in a footnote, the comment omits any analysis or authoritative citations. And it discusses none of the policy underpinnings on which our Supreme Court predicated its decision in Runyan. Indeed, the record is silent on whether the parties cited Runyan to the Paschke court or that the court was aware of its precedent.[5] And courts, including Division Three of this court, have continued to follow Runyan when considering the question in the offender score context even after Paschke was decided. See State v. Burton, 92 Wn. App. 114, 960 P.2d 480 (1998) ("Explicit in Runyan is a rejection of Mr. Burton's argument: The 'very purpose of RCW 10.73.090 is to curtail exactly this type of delay in challenging convictions.'") (quoting Runyan, 121 Wn.2d at 450).

Here, Snively makes no direct attack on the validity of the SVP judgment.

[5] We also note that Snively fails to identify any published opinion that has relied on the Paschke footnote.

Rather, he attacks the validity of the underlying guilty pleas and reasons that "once the pleas on the prior convictions have been withdrawn, the SVP judgment also becomes invalid." Br. of Petitioner at 31. Like petitioner Kelly in Runyan, Snively is in fact challenging his prior convictions. Therefore, under Runyan, the one-year limitation period begins to run from the date of those convictions and therefore applies to his PRP. Furthermore, the policy imperatives identified in Runyan are equally applicable here and strongly favor application of the one-year time bar. To conclude otherwise would undermine the purpose of encouraging prisoners to file their PRPs promptly. RCW 10.73.090.

Accordingly, Paschke is unpersuasive and we decline to apply it here. And we adhere to the rule in Runyan—the one-year limitation period begins to run from the date the underlying judgment and sentence is entered.

Validity of SVP Commitment

Snively next argues that if we conclude that even one of his previous convictions should be vacated, that decision renders his SVP commitment invalid. Specifically, he contends that because his convictions "were obtained upon unconstitutional pleas of guilty . . . [and] [s]ince both convictions were predicates of the SVP judgment, vacation as to either or both results in the invalidity of the SVP Order of Commitment."[6] Br. of Petitioner at 32. The State responds that any of the prior convictions is sufficient to

[6] Snively refers to "both convictions," but his SVP commitment is based on three predicate convictions—one indecent liberties conviction and two convictions for first degree child molestation.

uphold the SVP commitment but concedes that "[s]hould this Court grant Snively's PRP and vacate all three convictions . . . Snively's commitment order would no longer be valid." State's Response at 3. We agree with the State.

In substance, Snively's argument challenges the sufficiency of the evidence for his SVP commitment. In order to uphold an SVP commitment, a reviewing court must find that the jury had sufficient evidence to find the following elements:

> (1) That the respondent had been convicted of or charged[7] with a crime of sexual violence; and
> (2) That the respondent suffers from a mental abnormality or personality disorder; and
> (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.[8]

(Emphasis added.) In re Detention of Thorell, 149 Wn.2d 724, 759, 72 P.3d 708 (2003). In a sufficiency challenge to an SVP commitment, all reasonable inferences must be drawn in favor of the State. In re Detention of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006). "The commitment will be upheld if any rational trier of fact could have found the essential elements beyond a reasonable doubt." Audett, 158 Wn.2d at 727–28. Here, Snively challenges only the predicate offense element—"[t]hat the respondent had been convicted of or charged with a crime of sexual violence." Thorell,

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[7] The provision for persons charged but not convicted with a sexually violent offense applies only to "those who have no predicate conviction because they have been found incompetent or not guilty by reason of insanity." State's Response at 2; see also former RCW 71.09.030(3)–(4) (2006).

[8] Former RCW 71.09.020(16) (2006) defined "Sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."

149 Wn.2d at 759. The State, however, filed the SVP petition based on three separate predicate offenses and Snively has successfully challenged only the indecent liberties conviction. Therefore, "any rational trier of fact could have found the essential element[]" of a predicate offense based on the two first degree child molestation convictions. Audett, 158 Wn.2d at 727–28.

Snively bases his argument on State v. Gregory, 158 Wn.2d 759, 800, 147 P.3d 1201 (2006). But that case arose in the unique context of assessing mitigating factors in a death penalty sentencing phase, not analyzing the sufficiency of the evidence for an SVP element. There, because the court reversed prior rape convictions and the jury considered them in assessing mitigating factors, the court also remanded for resentencing. Gregory, 158 Wn.2d at 849, 867. Thus, because the jury's decision in Gregory was a factor-based assessment, the court could not determine which factor the jury relied on. In contrast, here, the predicate offense element is still satisfied by the two valid first degree child molestation convictions. Gregory is inapposite.

Ineffective Assistance of Counsel

Snively finally contends that his trial counsel's failure to advise him about the correct term of community placement for both his indecent liberties and child molestation offenses constituted ineffective assistance of counsel. Because we conclude that Snively is entitled to withdraw his indecent liberties plea based on involuntariness, we decline to address his indecent liberties ineffective assistance claim. And Snively's challenge to his child molestation convictions is time barred because he has failed to demonstrate facial invalidity. As such, this ineffective

assistance claim fails. See State v. Wade, 133 Wn. App. 855, 870, 138 P.3d 168 (2006) (finding that ineffective assistance of counsel claims do "not fall under the permissible grounds for collateral review more than one year after finality").

In sum, Snively may withdraw his indecent liberties guilty plea, but the petition challenging his SVP commitment is denied.

WE CONCUR: